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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 831.

THE HARTFORD ELECTRIC LIGHT COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

BRIEF FILED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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April 10, 1943.

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OPINION BELOW.

Th opinion of the Circuit Court of Appeals for the Second Circuit is reported in 131 Fed. (2nd), page 953.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several States of the United States except two, one of which has no State regulatory commission.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. Appearance is made herein on behalf of said Association by direction of the President and also of the Executive Committee of said Association, in the general public interest.

STATEMENT OF THE CASE.

This proceeding involves the validity of orders of the Federal Power Commission, hereinafter called Commission, dated February 25, 1941 and October 21, 1941, which directed Hartford Electric Light Company, hereinafter called Hartford, to comply with accounting orders of the Commission (R-1060, 1073, 1276). Hartford sought a review of these orders of the Commission by the United States Circuit Court of Appeals for the Second Circuit upon the ground that it was not subject to the jurisdiction of the Commission under the Federal Power Act. That Court affirmed the orders of the Commission in an opinion (R-1293), and entered judgment accordingly (R-1320).

SPECIFICATION OF ERROR.

The only error specified for argument herein is the following: The Court erred in holding that facilities of Hartford used only in the generation of electric energy, and in the sale thereof at the point of generation, constituted facilities within the jurisdiction of the Commission under Section 201(b) of the Federal Power Act, bringing Hartford within the definition of a public utility contained in Section 201(e) of said Act.

SUMMARY STATEMENT OF FACTS.

The facts of this case, so far as necessary to be stated for the purpose of this brief, are as follows:

Hartford is a Connecticut corporation, operating an electric generating plant in Hartford, Connecticut. It also distributes electric energy locally in and about Hartford, in that State. It likewise sells electric energy at wholesale to Connecticut Power Company, another Connecticut corporation, hereinafter called Connecticut. It sells no electric energy in interstate commerce, unless, as a matter of law, the sales to Connecticut constitute sales in interstate commerce.

Connecticut is a member of the Connecticut Valley Exchange, hereinafter called the Exchange. The Exchange consists of Massachusetts and Connecticut utilities, and is operated for the purpose of enabling members to exchange electric energy at incremental cost. Electric energy generated by Hartford, and sold by it to Connecticut, is, to a substantial extent, through such exchange transactions, transmitted into Massachusetts, and is there sold, by Massachusetts members of the Exchange, to Massachusetts consumers.

Aside from its facilities used only in local distribution, Hartford owns no facilities for generation or transmission outside its generating plant.

Energy sold by Hartford to Connecticut is delivered at the bushings on the wall of its generating plant. Connecticut owns the facilities between such point of delivery and a transformer substation located near the generating plant, which substation is also owned by Connecticut. From that substation, Connecticut directs the energy purchased from Hartford to the territory served by Connecticut, or makes the same available for use by the Exchange. Energy used by the Exchange is transmitted to the Massachusetts state line over a 66,000-volt transmission line, owned by Connecticut. Hartford generates at 11,000 volts and makes delivery to Connecticut at that voltage. Before energy can

be transmitted as far as the Massachusetts state line, however, it is necessary to transform the same, and this is done by Connecticut at its substation.

Prior to the enactment of Federal Power Act, Hartford was a member of the Exchange. It then owned this 66,000-volt line, the transformer substation, and the facilities between that substation and the generating plant. Prior to July 1, 1935, however, it ceased to be a member of the Exchange, and sold to Connecticut the 66,000-volt transmission line, the transformer substation, and all facilities between that station and the generating plant. Its purpose in withdrawing from the Exchange, and in making this sale, was to avoid being subject to the Federal Power Act.

Thereafter, Connecticut purchased energy from Hartford, and used a part of the same in its exchange transactions, in the manner hereinbefore stated. The movement of electric energy, in these exchange transactions, has been the same since such sale as it was prior thereto.

Hartford is under contract obligation to supply firm power up to a designated limit, required by Connecticut for its sales to intrastate customers. Although not obligated to do so, Hartford also sells to Connecticut its surplus energy, and it is this surplus energy which enables Connecticut to transmit energy into Massachusetts, under the exchange arrangement.

Hartford knows that Connecticut thus transmits into Massachusetts a part of the energy supplied by Hartford. As the Court below found, however, Hartford never sells any designated block of energy for specific interstate use. Connecticut may either distribute a particular purchase to its customers or put it on the transmission line to Massachusetts. Hartford has no interstate energy business except in so far as its sales of energy to Connecticut, transmitted to Massachusetts, may, "as a matter of law," under the act, constitute interstate transactions.

The Commission held that Hartford was a public utility, subject to the Federal Power Act, upon the following grounds:

(1) that "the facilities between the generators and the bushings on the wall of its generating plant" are facilities used in an interstate sale at wholesale, not excluded from the Commission's jurisdiction by Section 201(b), and (2) that the "corporate organization of Hartford, its contracts, its books of account, its instrumentalities for billing and collecting * * * are used in the sale of electric energy," and are thus subject to the Commission's jurisdiction.

REASONS FOR GRANTING THE WRIT

(1) This is the first case adjudicated by a court calling for a construction of those provisions of the Federal Power Act which relate to generating companies. The court below has erroneously construed these provisions in such fashion as to nullify the same. The decision should be reviewed for the purpose of correcting the error below, and establishing a proper construction for the government of all Federal Courts and of the Commission.

(2) Construction of the provisions of the Federal Power Act relating to generating companies is not called for in *Jersey Central Power and Light Company* v. *Federal Power Commission,* now pending before this Court. It is of national importance that the same be considered by this Court at this time, so that a comprehensive construction of those provisions which limit the jurisdiction of the Commission may be made, for the guidance of the Commission, of electric utilities which may be affected thereby, of State authorities, and of the Federal Courts of Appeal.

ARGUMENT.

A Generating Company Which Sells for Resale at the Point of Generation to an Electric Utility Which Transmits Energy So Sold in Interstate Commerce Is Not, by Reason of Such Sales, Subject to the Jurisdiction of the Federal Power Commission.

The Commission and the Court of Appeals recognize the crucial question in this case to be whether Hartford owns facilities subject to the jurisdiction of the Commission. They recognize further that decision of that question depends upon the construction of the provisions of Section 201(b) of the Federal Power Act.

The only transactions of Hartford which have any connection with electric energy which passes over a State line are the generation of such energy and its sale at the point of generation. For the purposes of this case, therefore, Hartford is a generating company pure and simple, selling at the point of generation.

Because the transmission of electric energy into Massachusetts, after its sale to Connecticut, is found by the Commission to be instantaneous, the Commission holds such sale by Hartford to be a sale in interstate commerce, and the plant facilities, the office paraphernalia and the corporate organization of Hartford to be facilities subject to the jurisdiction of the Commission. This holding the Commission bases upon the provision of Section 201(b) that the Commission "shall have jurisdiction over *all* facilities for transmission or sale of electric energy in interstate commerce". In other words, the Commission rules, in effect, that every sale for resale of electric energy which moves in interstate commerce, by whomsoever made, is within its jurisdiction under Section 201(b), and that ownership or operation of any facilities used in connection therewith brings the owner or operator within the definition of Section 201(e), as a "public utility". That ruling would bring under the Commission every generating company selling enery transmitted by a purchaser in interstate commerce.

The Court of Appeals (1) unanimously sustained the Commission's orders upon the ground that Hartford's "corporate organization, contracts, accounts, memoranda, papers and other records", in so far as utilized in connection with sales for resale in interstate commerce, are subject to the jurisdiction of the Commission under the Act, and, (2) a majority of the Court sustained the Commission upon the further ground that, even if Hartford "has nothing except facilities for generation, * * * generation facilities, where used as aids to such sales (for resale in interstate commerce) are within the Commission's jurisdiction under Section 201(b)."

There is thus presented the question whether a generating company which sells energy at the point of generation, with knowledge that the purchaser will transmit a part of the same in interstate commerce, is subject to the Act, notwithstanding the provisions of 201(b) of the Act excluding generating facilities from the jurisdiction of the Commission.

The Commission holds that the exclusion provisions do not apply because of the qualifying words in Section 201(b) "except as specifically provided in this Part and the Part next following." The Court of Appeals holds that the exclusion provisions do not apply, but reaches that conclusion by another process of reasoning.

Avoiding a decision upon the question of whether the facilities between the generator and the bushings on the wall are transmission facilities, the Court holds that they are facilities used for the sale of electric energy at wholesale in interstate commerce, and that jurisdiction is specifically granted to the Commission thereover by the opening words of the last sentence of Section 201(b), "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy (at wholesale in interstate commerce)". The words following, the Court below holds, in no way limit that specific grant. Such following words, the Court says, should be read "as a negatively worded con-

firmation" of jurisdiction specifically granted in the Act, including the specific grant just quoted.

The purpose of all statutory construction is, or should be, to effectuate the legislative purpose. The construction which attributes to the concluding words of Section 201(b) no limiting effect, we submit, has been arrived at not by searching to discover the probable purpose of Congress, but, by adroit reasoning, to escape from any limitation upon the broad grant of jurisdiction in the opening words of Section 201(b).

Those words are: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy (at wholesale in interstate commerce)." This grant, however, is immediately followed by the words: "but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

To say that these words, just quoted, were not designed to limit the scope of the immediately preceding grant, is to refuse recognition to the obvious. Section 201 (b) is to be read in the light of the legislative history of the Act, and in the light of other related provisions of the Act. The declaration of policy and purpose contained in paragraph (a) of the same section is of especial significance. It is there declared "that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest * * *". It was of that part of this business "which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" of which Congress declared regulation necessary in the public interest.

The intent was to regulate that part of that business, whether the transmission and sale should be by the owner of

the energy transmitted, or the transmission should be for the owner by another receiving compensation or a toll therefor.

This is the construction which was correctly placed upon applicable provisions of the Act by Assistant Attorney-General Shea, at the oral argument of the *Jersey Central Power and Light Company case* before this Court.

These wholesale transactions of transmission and sale, across State lines, when the Federal Power Act was enacted, had been declared by this Court to be beyond the reach of State power, as Congress understood the decision in *Attleboro Steam and Electric Company* v. *Public Utilities Commission,* 273 U. S. 83.

Congress intended to supply regulation only for that part of the business which the States could not regulate. In Section 201(a) it designated that part, and declared that Federal regulation was to extend "only to those matters which are not subject to regulation by the States." The purpose of the excluding words of 201(a), just quoted, was not to limit the regulatory power of the Commission as to matters concerning which jurisdiction was specifically granted, but was to indicate the purpose of Congress, as a guide to the Commission in the construction and administration of the Act. For example, as argued by Mr. Shea, at the Jersey Central Power and Light Company arguments, Congress designed to make clear its intent not to displace State power to regulate service and rates to consumers, even in cases where such service might be supplied across State lines.

The opinion below, as we have seen, avoids the effect of the limiting words of Section 201(b) by the simple expedient of saying that they are not limiting words, in so far as interstate facilities are concerned, but, on the contrary, are confirming words, or words which repeat a grant or grants otherwise specifically made. The opinion refers to the clause containing these limiting words as the "'but' clause." For convenience that designation is adopted for the discussion in this brief.

The opinion seeks to justify the construction which it places upon the "but" clause, by saying:

> "* * * among the facilities described in the 'but' clause are those used 'only for the transmission * * * in intrastate commerce'; as such facilities could not possibly be among those used for interstate transmission or interstate wholesale sales, the 'but' clause becomes foolish as carving out of the authority granted in the earlier part of the same sentence the facilities described in the 'but' clause. Such a foolish interpretation is avoided by (the construction adopted by the opinion)."

In commenting upon this argument to support the opinion, it may be observed that it would seem a not less "foolish construction" to hold that Congress having, in the second sentence of Section 201(b), conferred upon the Commission jurisdiction over all facilities for transmission or sale, in positive and specific language, considered it necessary, in that self-same sentence, to reiterate the grant to confirm to the Commission the jurisdiction there and elsewhere conferred, which, except for the "but" clause could not possibly have been brought into question, in construing the Act. So construed the "but" clause certainly approaches sufficiently near to the line of foolishness to invite some effort to find a more rational purpose for the clause. Such purpose is easily discoverable.

The "but" in the "but" clause was not in the bill when it was introduced in the Senate. It came in later in a manner to be indicated. The clause, however, was always an expression of the purpose of the Congress to narrow the application of the bill. A brief reference to the legislative history of the bill will demonstrate this fact, and will completely negative the idea that the clause was designed not to reduce but to confirm, in all its breadth, the grant of jurisdiction which the clause to which it is appended, standing alone, would have given.

The legislative history of the Act shows that the bill which became the Federal Power Act, as it was first intro-

duced in the two Houses of Congress, was drawn to include generating companies, that the purpose to include such companies was abandoned, and that one of the prime purposes of the "but" clause was to insure their exclusion from the jurisdiction which the bill did grant to the Commission.

The bill first presented was introduced in the Senate by Senator Wheeler as S. 1725, and in the House by Congressman Rayburn as H. R. 5423. In the bill as introduced, Section 201 read as follows:

> "SECTION 201. (a) The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities for the retail distribution of electric energy, or for the production or transmission of energy solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale. Every person who owns or operates facilities subject to the jurisdiction of the commission under this title and every person who controls, directly or indirectly, any such person shall be subject to the provisions of this title and title III. The term 'public utility' when used in this title and title III means any person who owns or operates such facilities.
>
> "(b) Electric energy shall be held to be transmitted in interstate commerce if transmitted from a State to any point outside thereof; or between points within the same State but through any point outside thereof; or from or to any place in the United States to or from a foreign country; but only insofar as such transmission takes place within the United States."

Committee hearings were held in each House. Objection was made to the broad sweep of the bill. The Senate Com-

mittee reported the bill in a new draft, as S. 2796. As reported and passed, Section 201 read as follows:

> "SECTION 201. (a) It is hereby declared that the business of generating, transmitting, and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of that part of said business which consists of the transmission and sale of electric energy in interstate commerce and the generation of electric energy for such transmission and sale is necessary in the public interest. It is further declared to be the policy of Congress to extend Federal regulation to those matters which cannot be regulated by the States, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and not to impair or diminish the powers of any State commission.
>
> "(b) The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce and to the production of electric energy for such transmission or sale, but shall not apply to the retail sale of such energy in local distribution. The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following."

It may be pointed out that the bill, when introduced, exhibited the peculiar grammatical structure which appears in Section 201(b) as enacted, in that a broad all-inclusive provision was limited and cut down by a "but" clause, as follows:

> "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale *but shall not apply to the retail sale of energy in local distribution.*"

This "but" clause was plainly designed to reduce the effect of the preceding sentence by excluding from the Commission's jurisdiction sales of electric energy to consumers. Also we point out that the next following sentence contained an "except" clause for a similar purpose of exclusion. These first two sentences, with some changes in phraseology, were carried into Section 201(b) of S. 2796, the "but" form being retained in the first sentence, and the "except" form in the next following sentence. Among the exceptions stated in the "except" clause in S. 2796 were "facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution." It was this "except" clause which finally became the "but" clause discussed in the opinion below.

We submit that it must be apparent that when the Senate passed the bill there was no more occasion for including such facilities in the "except" clause than there was for retaining them in that clause when it had become the "but" clause. The grant to which the exceptions were stated was a grant of "jurisdiction over all facilities for *such* production, transmission or sale", with the "such" relating back to "the transmission (and) * * * to the sale of electric energy at wholesale in interstate commerce", in the first sentence of the paragraph. It is obvious, just as the opinion below states, that "such facilities could not possibly be among those used for the interstate transmission or interstate wholesale sales"; *but it is just as obvious that in the bill as passed by the Senate they were named in the "except" clause with the design that they should be excluded from the Commission's jurisdiction.* Whether the phraseology was "foolish" or not, the purpose of the clause at that stage was not doubtful.

The House, having held hearings on H. R. 5423, redrafted S. 2796, and passed the same in a new form. Among other changes it determined to withhold from the Commission jurisdiction over the generating business. This court had held that generation was local, in *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165; and, consistently with its design to preserve state jurisdiction to the fullest practicable extent, the House eliminated "generation" from the declaration of purpose in Section 201(a), and added "facilities used for the generation of electric energy" to those excluded from the Commission's jurisdiction by the second sentence in Section 201(b). As the bill passed the House, Section 201(b) read as follows:

> "(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction over facilities used for generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

In making the changes which it made, in Section 201(b), the House brought the first and second sentences into uniformity in grammatical structure by adopting the "but" form of exception for each. This change not only produced uniformity, but seemed to make the exclusion of the facilities specified more emphatic.

It is a striking example of the infirmity of the English language which contributes to the difficulty of securing the administration of law in conformity with the legislative will, that the very means which the Congress took to make emphatic its expression of purpose is now made the basis

of a judicial opinion which accomplishes the exact opposite of that purpose.

That the legislative purpose was one of exclusion is plain, not alone by reason of the original form of the bill, and the manner in which the changes were made, to which we have adverted. The purpose was explicitly stated by the House Committee in reporting S. 2796. In its report the Committee said:

> "Subsection (a) contains a declaration of policy, * * *. The inclusion of generation as carried in the Senate bill is omitted by your Committee.
>
> "Subsection (b) confers jurisdiction upon the Commission * * *. As in subsection (a), the provisions of the Senate bill relating to the production of electric energy for interstate transmission and facilities for such production are omitted."

These statements respecting generation had reference, of course, to those provisions of the bill which dealt with the production of electric energy contained in Section 201. There were other sections of the bill which gave to the Commission a certain limited jurisdiction as respects generation under certain circumstances.

When the bill went to conference between the two Houses, the second sentence of Section 201(b) was amended, so that such jurisdiction as was designed to be conferred by these other sections should not be affected. Section 201(b) took its final form, the second sentence being made to read as follows:

> "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, *except as specifically provided in this Part and the Part next following*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (Italics supplied)

The purpose of the inserted words, here italicized, was stated to the House by the House Conferees as follows:

> "The Senate bill in Section 201(a) contained a somewhat more lengthy declaration of policy than the House Amendment, the only material difference being that the House Amendment contained no reference to 'generation' of electric energy which appeared in the Senate bill. The conference substitute *follows the language of the House Amendment* but inserts a clause relating to generation to the extent regulation thereof is provided in this Part and the Part next following. * * * The same general differences between the Senate bill and the House Amendment has been followed with a *clarifying phrase* added to remove any doubt as to the Commission's jurisdiction over the facilities used for the generation and local distribution of electric energy *to the extent provided in other sections* of this Part and the Part next following." (Italics supplied)

This Committee report makes it plain that no change in the purpose of the bill, as passed by the House, with respect to generating facilities was designed by the Conferees. The phrase added was a "clarifying phrase", to make clear what had previously been the intention of the House, and was inserted only "to remove any doubt" that such jurisdiction as was specifically conferred "in other sections" of the Act was not intended to be negatived.

The idea that the so-called "but" clause was a confirmation of jurisdiction in the Commission, and not an exception therefrom, was something new in the opinion below. Quite plainly the Commission had no doubt that the clause was designed to effect exceptions from its jurisdiction. In its opinion, the Commission asserted its jurisdiction over the facilities in question, *not upon the ground that the "but" clause was not an excepting clause* but upon the ground that the exception as to generating facilities "is itself subject to a further exception, to wit, 'except as specifically provided in this Part and the Part next following.'"

The Commission points out that under Section 207, 301 (a), and 308 it may issue orders to public utilities which require information with respect to the cost of facilities used for generation, or which require accounts to be kept respecting generation, or which require improvements in service which may involve generation. From these provisions of Parts II and III the Commission concludes that the exception in the "but" clause negatives the application of that exception clause to the facilities in question in this case.

This not only disregards the guiding declaration of Congress in Section 201(a) but it disregards the limited character of the exception within the "but" clause, and the purpose of that clause itself.

The "but" clause is a limitation upon the words: "The Commission shall have jurisdiction over all facilities for such transmission or sale * * *". The "but" clause provides that such grant of jurisdiction shall not apply to give the Commission "jurisdiction * * * over facilities used for the generation of electric energy". The purpose of that exception is obvious. Congress recognized that a generating company must make sales of its energy, and that it might be argued that such sales, in cases where the energy was transmitted into another State, constituted sales in interstate commerce. It therefore negatived that contention by the exception in the "but" clause, the effect of which was to withhold the facilities of generating companies used in generation (and in sale at the point of generation) from being placed within the jurisdiction of the Commission by Section 201(b).

The Congress, however, included within the "but" clause the words "except as specifically provided in this Part and in the Part next following." The purpose of this exception within the exception clause is likewise obvious. By said Section 207, 301(a) and 308 of the same Act, the Commission was specifically granted jurisdiction touching generation. Also in Section 202(c) and (d) it was provided that in time of war or of national emergency the Commission

should have power "to require by order such temporary connection of facilities and such generation * * * of electric energy" as the Commission should find requisite in the public interest. Persons not otherwise subject to the jurisdiction of the Commission, however, were not to become "public utilities" by reason of conformity to requirements made by the Commission under Section 202(c) and (d).

By these several sections, the Commission was specifically enabled to exercise jurisdiction for certain purposes under certain circumstances as respects generation, under Parts II and III. It was not intended that such jurisdiction should be affected by the exception incorporated in the "but" clause in Section 201(b). Accordingly, Congress inserted the exception within the "but" clause.

Such insertion, however, merely prevented the jurisdiction specifically granted as aforesaid from being brought into question. It did not have the effect of bringing all owners of generating facilities within the jurisdiction of the Commission. It was designed only to negative any possible question as to the full jurisdiction of the Commission, in the exercise of the powers specifically granted in Parts II and III, over utilities otherwise marked as "public utilities."

The distinguishing mark of a "public utility", as defined in Section 201(e), is the ownership or operation of facilities subject to the jurisdiction of the Commission by subsection (b) of the same Section 201. Those are the facilities used in the transmission, or in the sale at wholesale, in interstate commerce of electric energy,—other than the facilities of a generating company used in generating electric energy sold at the point of generation.

It is facilities used in *generation* upon which the Commission relies as bringing Hartford within its jurisdiction.

The court below cites *Peoples Natural Gas Company* v. *Federal Power Commission,* 127 Fed. (2d) 153, as supporting its construction. In that case the District of Columbia Court of Appeals construed a similar "but" clause, in the Natural Gas Act, as not precluding it from holding subject

to the Commission's jurisdiction a sale of natural gas by the Peoples Natural Gas Company in Pennsylvania to another utility, which immediately transported to New York, for distribution to the public.

We do not digress from this case to argue the *Peoples Natural Gas Company case;* but the Peoples Natural Gas Company is the same company which was a party to *Peoples Natural Gas Company* v. *Public Service Commission,* 270 U. S. 550, from the opinion in which it appears that the Peoples Company is engaged in sales to consumers and for resale in Pennsylvania, its operations being described in part as follows:

> "The Peoples Company is a public service corporation created under the laws of Pennsylvania and engaged in producing, purchasing, transporting by pipe line, and selling natural gas. *It purchases about two thirds of the gas which it transports and sells from a producing company in West Virginia* having pipe lines *leading from wells in that state to the boundary between the two states;* and it produces the other one third from its own wells in the southwestern counties of Pennsylvania. It has a system of pipe lines in Pennsylvania *which is connected at the state boundary with the lines of the West Virginia company* and leads thence to Pittsburgh, Johnstown, and other Pennsylvania cities and boroughs where it sells the gas." (Italics supplied)

The *Peoples Natural Gas Company case* was decided on the pleadings. The Company's contention seems to have been that it was not engaged in interstate transportation of natural gas because all of its transportation was within Pennsylvania. In a statement for the People Company in the District of Columbia Court of Appeals, printed in the appendix to the brief for the Federal Power Commission in that court, counsel for the Company said:

> "The Peoples Natural Gas Company operates exclusively in Pennsylvania. All of its properties are in Pennsylvania. Its primary business is supplying gas to the City of Pittsburgh and its environs. It also

> supplies gas to various other communities in western Pennsylvania. Its lines begin near the southerly line. * * * In the last two years or so the supply of the New York State Natural Gas Corporation has failed, and there are times when the demands of the New York State Natural Gas Corporation are such that some gas is sold and delivered by the Peoples Company to the New York State Natural Gas Corporation; but that delivery is made at a point in Pennsylvania a hundred miles or so from the New York State line, within the Commonwealth of Pennsylvania. * * * so far as the New York State Natural Gas Corporation is concerned, the station at which the delivery is made is at the northern end of the field from which gas is produced. True, *some of it is conveyed as much as 25 miles, perhaps further.* All of that is in Pennsylvania, however, and within the producing basin." (Italics supplied)

That case can scarcely be called analogous to this case. Peoples Natural Gas Company was plainly a "public utility", as defined in the Natural Gas Act, and the sale by it to the New York Company, for resale, was plainly subject to the Act.

For a construction of the "but" clause of the Natural Gas Act, as applied to a producer, pure and simple, we point to an opinion of the Federal Power Commission in the *Columbian Fuel Corporation case,* 35 P. U. R. (N. S.) 3. Under the doctrine laid down in *Gray* v. *Powell et al.,* 314 U. S. 402, 413, this early construction of the Natural Gas Act by the Commission, whereby it determined that it was without jurisdiction over producers selling at the point of production, basing its construction upon the clearly evidenced intent of Congress, will receive its appropriate weight whenever this court shall come to construe the "but" clause in the Natural Gas Act. Had the Commission paid the same deference to the legislative will in this case which is paid in the *Columbia Fuel Corporation case,* this case would not be before this court.

Upon the face of the Federal Power Act, read in the light of its legislative history, the purpose of Congress to

accomplish the exclusion of generating companies from Federal regulation, by the exclusion of their facilities from the jurisdiction of the Commission, seems clear beyond opportunity for reasonable question. At the very least it must be admitted that the Act leaves the Commission's jurisdiction doubtful. There is no reasonably explicit statement of the purpose of Congress to grant the Commission jurisdiction in a case such as this.

If there be doubt, the doubt should be resolved in favor of the preservation to the States of a governmental power which was undoubtedly theirs prior to the passage of the Federal Power Act, under the decision of this court in *Utah Power and Light Company* v. *Pfost.* 286 U. S. 165. The court made it plain in a very recent decision that legislation will not be construed in derogation of state powers except when the intent to withdraw or override those powers is clearly expressed. *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania* (Decided March 1, 1943.)

The Commission in its opinions attached much importance to the fact that prior to its sale of the sub-station and other transmission facilities Hartford was a member of the Exchange, and, as such, engaged in exchange transactions, whereby power generated by it was transported into Massachusetts, where it was sold and consumed. Touching those facts, the Association in its brief in the court below said:

> "To us these facts seem utterly insignificant * * *. Hartford had the right to sell the property which it did sell. No one questions that. Hartford also had the right to elect to confine its activities to those which the Federal government has not undertaken to regulate. * * * We submit that whether Hartford is or not subject to the Federal Power Act depends upon the facts as to its present ownership or operation of property subject to the Commission's jurisdiction. If it does not own or operate such property, the fact that it once did is entirely irrelevant. It is irrelevant also that Hartford disposed of the facilities outside its generating plant for the purpose of avoiding regulation by the

Federal Power Commission. Congress established the line of demarcation between electric utilities over which the Federal Power Commission should have jurisdiction and those which should be free from such jurisdiction. Hartford had the right, if it could, to place itself on that side of the line where it chose to be.

"The applicable rule was very clearly expressed by Mr. Justice Holmes in *Superior Oil Company* v. *Mississippi*, 280 U. S. 190, (in which it was said:)

"'The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana, and hoped not to be in Mississippi. The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it.'"

The court below disclaimed basing its opinion upon any theory of agency or affiliation, or upon the fact that Hartford sold its facilities for the purpose of avoiding the jurisdiction of the Commission; but the court does appear to have attached great weight to the knowledge of Hartford that part of the energy sold by it to Connecticut was being transmitted outside of the State where it was sold and consumed.

We submit that the fact of such knowledge on the part of Hartford is just as irrelevant and inconsequential as its original ownership, and later sale of the transmission facilities just mentioned.

When the Senate proposed to declare necessary in the public interest "Federal regulation of that part of such business which consists of * * * the generation of electric energy for such transmission and sale (in interstate commerce)", it was proposing to provide regulation for exactly the character of sales here involved; and when the House, and finally the Congress, determined to exclude from Federal regulation the generating business it knew that it was excluding a large volume of such sales. It did not choose to make this exclusion dependent upon ignorance by generating utilities of the interstate use of energy sold by them.

It would be a strange law that would make the jurisdiction of a Federal commission dependent, not upon the character of the operations to be regulated, but upon the extent of the knowledge of utilities producing electric energy as to the disposition of such energy after sale.

No question of Federal power is presented by this case. We are not questioning here the power of Congress to regulate the generation of electric energy produced for transmission and sale in interstate commerce. The question is what Congress intended to bring under regulation by the Commission; and the Commission should be held to the exercise of the jurisdiction which Congress intended to grant. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 249, 355.

The opinion below pays lip service to the rule just mentioned, but applies another. Having declared the "but" clause, in so far as interstate generation and transmission and sale in interstate commerce are concerned, not a limiting but a confirming clause, the opinion considers a contrary construction, saying:

> "Regarding the 'but' clause as an exception, and keeping in mind the obvious purpose of Congress, disclosed in the legislative history, to see to it that there was effective regulation of interstate wholesale sales of electrical energy, we consider as pertinent the 'elementary rule requiring that exceptions from a general policy which a law embodies *should be strictly construed* * * *'.
>
> "The point is that it is not as such that the generation facilities are subject to the Commission's jurisdiction under Sec. 201(b), but as facilities used in the business of *knowingly* selling electric energy wholesale in interstate comerce. It is *the fact of petitioner's knowledge* which should dissipate the apprehension expressed in the brief of amicus curiae that the result of a decision sustaining the Commission in this case 'will be to bring under the Commission's jurisdiction every generating company which generates any electric energy which finds its way into interstate commerce.' We are not holding, nor did the Commission hold, that

the Act has 'the effect of bringing all owners of generating facilities' with that jurisdiction." (Italics supplied)

The rule which was applied by the court below is plainly the exact reverse of the rule declared by this court in *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* cited supra.

It may also be observed that the declaration in the opinion below, as to the limited effect of the holding below, can scarcely remove the "apprehension expressed in the brief of amicus curiae" inasmuch as it is true, as the footnote to the opinion admits,—oddly enough in view of the expression of assurance,—that "once it is decided that the Commission has 'jurisdiction' over any of petitioner's facilities, then the petitioner is a 'public utility', and the Commission is then vested with specific powers under the several sections of the Act which refer to a 'public utility';".

These powers, referred to in the quotation, include the power to regulate rates and service. Unless Congress, by the Federal Power Act, has so far occupied the field as to prevent, the Connecticut Commission can regulate the service of Hartford to Connecticut and other distributing companies in that State, and can regulate the rates for such service, regardless of the use in interstate exchange transactions of a part of the energy received by Connecticut.

The point is that Congress by the language of the Federal Power Act, and by the declarations of its committees, in charge of the bill, has made evident its purpose not to extend Federal regulation to the business of the production of electric energy. Sales are an inevitable part of the business of production, and facilities used in such sales are a part of the facilities, of whatever character, used in that business, and, as such, are expressly excluded from the Commission's jurisdiction by Section 201(b).

The fact that such inevitable sales may be of a character which might be held "in interstate commerce," and thus might be subject to Federal regulation, if Congress should so determine, is irrelevant. The facilities having been ex-

cluded by Congress from the Commission's jurisdiction, for the very purpose of excluding the generating business from Federal regulation, that purpose can not properly be nullified by declaring the facilities under the Commission's jurisdiction because they are used in making such inevitable sales.

We ask that the writ be granted, to the end that the court may hold that the Congress has manifested its purpose to exclude generating companies from regulation under the Federal Power Act, and that the Commission must yield obedience to the will of Congress.

Respectfully submitted,

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